Yang Ah Teng v Leong Mun Keong

HIGH COURT (KUALA TERENGGANU) — ORIGINATING SUMMONS NO 24–110 OF 1998
ABDUL KADIR SULAIMAN J
22 OCTOBER 1999

Civil Procedure *— Pleadings — Intitulement on summons — Plaintiff specified several sections and rules of court under which application was made — Liberty to shift from one section/rule to another without warning to defendant or court — Whether application was wrong and embarrassing — Whether plaintiff's subsequent election would remedy situation*

Land Law *— Sale of land — Auction — Chargor owner of only one third of land — Whether whole charge become unenforceable — Whether sale by auction of one third share invalid — National Land Code 1965 s 241*

Leong Wan Yin was the registered owner of a piece of land ('the first land'). He also owned $^1/_3$ share in another piece of land ('the second land') and held the remaining $^2/_3$ share as a trustee for two minors. The two pieces of land were charged to the bank. The bank brought a charge action against the owners of the lands. The court held that the $^2/_3$ undivided share in the second land should not be foreclosed but ordered that the rest of the properties which included the $^1/_3$ share held by the chargee in his own right be sold by public action. The bank appealed to the Supreme Court against the court's order that the $^2/_3$ undivided share held in trust for the minors not to be foreclosed. The appeal was dismissed. The plaintiff was the successful bidder in respect of the $^1/_3$ share in the second land. The plaintiff's presentation for registration was refused because of the existence of the defendant's private caveat. The plaintiff then filed an application intituled as being 'in the matter of ss 323, 327 and 417 of the National Land Code 1965 and O 15 r 16 of the Rules of the High Court 1980' and prayed for: (i) a declaration that the defendant's caveat be annulled; (ii) the Registrar of Title be ordered to annul the caveat within seven days; and (iii) assessment of damages. The defendant raised preliminary objections as follows: (i) as the $^2/_3$ share in the land had been held unenforceable, the whole charge became unenforceable by virtue of s 241 of the National land Code 1965 ('the Code') which allows only the charging of the whole but not a part only of any undivided share in alienated land; (ii) the originating summons of the bank against the chargor leading to the auction of the $^1/_3$ share of the second land was invalid; and (iii) the plaintiff's application praying for declarations was defective in substance and was not curable.

Held, dismissing the plaintiff's application:

(1) The order of the court did not in any way affect the legality of the charge. The court in the order allowed the foreclosure of the $^1/_3$ share held by the chargor in his own right. By such an order, it did not mean that the charge was invalid, as otherwise, there

would not be an order at all as to the foreclosure of the $^1/_3$ share. Hence, it was erroneous on the part of the defendant to suggest that the charge which was the subject matter of the foreclosure proceedings by the bank was invalid rendering the sale by auction to the plaintiff to be invalid (see p 549F–G). A

(2) The court now could not go behind the valid order made by the judge. The plaintiff was not at all a party to the originating summons. He was involved only following the making of that valid order by being a purchaser for value without notice during the auction of the land arising out of that valid order for sale. The validity or otherwise of the originating summons resulting in the order for sale would not be the concern of this court and the plaintiff (see pp 549–550A). B C

(3) Although the plaintiff explicitly specified the various sections of the Code and rules of court under which the application was made, it left to the court and the defendant to have to conduct a close examination of the matter in order to determine the particular jurisdiction or power that was being invoked by the summons of the plaintiff. By the nature of the intitulement, the plaintiff would be at liberty to shift from one rule to another or indeed from one section of the law to another as he pleased without any warning whatsoever to the defendant or the court. It was clear that the plaintiff's application was not only wrong but plainly embarrassing (see pp 551C–D, 553C). D E

(4) Although strictly it was not the case of the plaintiff making alternative prayer, it was the case of him making certain prayers invoking two different jurisdictions of the sections of the law, ie ss 327 and 417 of the Code. He could not proceed based on the two provisions of the Code unless he elected either to proceed under s 327 or 417 of the Code (see p 554C–D). F

(5) The court had no power under the Code to make the declaration to annul the caveat as sought for by the plaintiff. What power the court had was as provided by s 327 for making an order for the removal of the caveat. But this was not what the plaintiff by his application wanted the court to do. Under the provisions of s 417, the court was also not empowered to do so as the entry of the defendant's caveat on the second land did not arise out of any judgment or order previously given or made by the court (see p 554G–I). G H

(6) The application of the plaintiff was indeed misconceived, frivolous and vexatious and a clear abuse of the process of court. Either way the plaintiff made his election now would not remedy the situation. This was not a case of a failure to comply with the requirements of the Rules of the High Court 1980 but a failure to comply with the specific provisions of the Code. Thus, O 2 of the Rules of the High Court 1980 did not at all apply in this case (see p 55A–C). I

A **[Bahasa Malaysia summary**

Leong Wan Yin adalah tuan punya berdaftar sebidang tanah ('tanah pertama tersebut'). Beliau juga memiliki $^1/_3$ bahagian di dalam sebidang tanah yang lain ('tanah yang kedua) dan memegang baki $^2/_3$ bahagian sebagai pemegang amanah untuk dua orang di bawah B umur. Kedua-dua bidang tanah tersebut telah digadaikan kepada bank. Bank tersebut telah mengambil tindakan gadaian ke atas tuan punya tanah-tanah tersebut. Mahkamah memutuskan bahawa $^2/_3$ bahagian yang tidak dibahagikan tidak patut dihalang tebus. Bank tersebut telah merayu ke Mahkamah Agung terhadap C perintah mahkamah bahawa $^2/_3$ bahagian yang tidak dibahagi yang dipegang secara amanah tidak patut dihalang tebus. Rayuan tersebut ditolak. Plaintif adalah pembeli secara bidaan yang berjaya berkenaan dengan $^1/_3$ bahagian di dalam tanah yang kedua tersebut. Pengemukaan plaintif untuk pendaftaran telah ditolak kerana kewujudan kaveat prsendirian defendan. Kemudian, plaintif D memfailkan permohonan yang dinamakan sebagai 'di dalam perkara ss 323, 327 dan 417 Kanun Tanah Negara 1965 dan A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980' dan memohon untuk: (i) suatu deklarasi bahawa kaveat defendan mestilah dibatalkan; (ii) Pendaftar Hak Milik diarah untuk membatalkan kaveat dalam masa tujuh hari; dan (iii) penaksiran gantirugi. Plaintif telah E membangkitkan bantahan-bantahan awal seperti berikut: (i) oleh kerana $^2/_3$ bahagian di dalam tanah tersebut telah diputuskan sebagai tidak boleh dikuatkuasakan, semua gadaian menjadi tidak boleh dikuatkuasakan menurut s 241 Kanun Tanah Negara 1965 ('Kanun tersebut') yang hanya membenarkan gadaian keseluruhan dan bukan F sebahagian sahaja apa-apa bahagian yang tidak dibahagikan di dalam tanah yang diberi milik; (ii) saman pemula bank tersebut terhadap pemberi gadaian yang membawa kepada lelong $^1/_3$ bahagian tersebut berkenaan dengan tanah kedua adalah tidak sah; dan (iii) permohonan plaintif untuk memohon suatu deklarasi adalah defektif dari segi kandungannya dan tidak dapat dipulihkan.

G

Diputuskan, menolak permohonan plaintif:

(1) Perintah mahkamah tidak dalam apa cara sekali menjejaskan keesahan gadaian tersebut. Mahkamah di dalam perintah tersebut membenarkan halang tebus tersebut berkenaan $^1/_3$ bahagian yang H dipegang oleh pemegang gadaian di bawah haknya sendiri. Dengan perintah sedemikian, ia tidak bermakna bahawa gadaian tersebut adalah tidak sah, kerana jika sebaliknya, tidak akan terdapat perintah langsung berkenaan halang tebus bahagian $^1/_3$ tersebut. Oleh itu, adalah salah di pihak defendan untuk mencadangkan bahawa gadaian tersebut yang merupakan I subjek perkara prosiding halang tebus oleh bank adalah tidak sah menyebabkan jualan melalui lelong kepada plaintif adalah tidak sah (lihat ms 549F–G).

(2) Mahkamah tidak boleh sekarang membelakangkan perintah sah yang dibuat oleh hakim. Plaintif bukanlah satu pihak kepada saman pemula tersebut. Beliau hanya terlibat selepas perintah sah dibuat dengan menjadi pembeli dengan balasan berharga tanpa notis semasa lelong tanah tersebut yang berbangkit daripada perintah jualan yang sah. Kesahan atau sebaliknya saman pemula tersebut yang mengakibatkan perintah jualan tersebut tidak perlu diberi perhatian oleh mahkamah ini dan plaintif (lihat ms 549I–550A).

(3) Walaupun plaintif secara nyata menyatakan beberapa seksyen Kanun dan peraturan mahakmah di mana permohonan dibuat, adalah terpulang kepada mahkamah dan defendan untuk menjalankan pemeriksaan rapat berkenaan dengan perkara tersebut untuk menentukan bidang kuasa atau kuasa yang dibangkitkan oleh saman plaintif. Dengan melihat bentuk tindakan tersebut, plaintif mempunyai kebebasan untuk menukarkan satu kaedah kepada yang lain atau hakikatnya daripada satu bahagian undang-undang kepada yang lain seperti yang diinginkannya tanpa sebarang amaran sekali pun kepada defendan dan mahkamah. Adalah jelas bahawa permohonan plaintif bukan sahaja salah tetapi adalah jelas memalukan (lihat ms 551C–D, 553C).

(4) Walaupun secara ketat ia bukanlah kes plaintif membuat permohonan secara alternatif tetapi adalah kesnya membuat beberapa permohonan membangkitkan dua bidang kuasa seksyen undang-undang yang berlainan, iaitu ss 327 dan 417 Kanun tersebut. Beliau tidak boleh meneruskan permohonan berdasarkan dua peruntukan-peruntukan Kanun tersebut kecuali beliau memilih sama ada untuk bermula di bawah ss 327 atau 417 Kanun tersebut (lihat ms 554C–D).

(5) Mahkamah tiada kuasa di bawah Kanun untuk membuat deklarasi untuk membatalkan kaveat tersebut seperti yang dipohon plaintif. Kuasa mahkamah yang ada diperuntukkan di bawah s 327 di dalam membuat suatu perintah untuk mengalihkan kaveat tersebut. Tetapi ini bukanlah apa diinginkan oleh melalui permohonannya kepada mahkamah. Di bawah peruntukan-peruntukan s 417, mahkamah juga tidak diberi kuasa untuk berbuat demikian kerana kemasukan kaveat defendan di atas tanah yang kedua tidak berbangkit daripada apa-apa penghakiman atau perintah yang diberikan atau dibuat sebelumnya oleh mahkamah (lihat ms 554G–I).

(6) Permohonan plaintif adalah silap, remeh dan menyusahkan dan jelas suatu penyalahgunaan proses mahkamah. Plaintif telah membuat pilihannya tidak akan meremedikan keadaan. Ini bukanlah kes kegagalan untuk mematuhi keperluan-keperluan Kaedah-Kaedah Mahkamah Tinggi 1980 tetapi suatu kegagalan untuk mematuhi peruntukan spesifik Kanun tersebut. Oleh itu,

A 2 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak terpakai di dalam kes ini (lihat ms 55A–C).]

Notes

For cases on pleadings generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3417–3818.

For cases on sale of land by auction, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2855–2869.

Cases referred to

Asia Life Assurance Society Ltd v Kong Leong Aik [1992] 4 CLJ 2053 (refd)

Cheow Chew Khoon @ Teoh Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)

Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd [1995] 2 MLJ 851 (refd)

Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd [1988] 2 CLJ 861 (refd)

Legislation referred to

National Land Code 1965 ss 241, 323, 327 and 417, Form 16E, F Rules of the High Court 1980 O 15 r 16

Hajira KM Abu Bakar (*Balendran Chong & Bodi*) for the plaintiff.
Mokhtar bin Ngah (*Mokhtar Ngah & Co*) for the defendant.

Abdul Kadir Sulaiman J:

Background facts

There are two pieces of land. One is represented by Grant No 5753 Lot No 43, Mukim Banggol, Kemaman ('the first land'), and the other is represented by Grant No 5369 Lot No 12, Mukim Kerteh, Kemaman ('the second land'). These two pieces of land were charged to Perwira Habib Bank Malaysia Berhad ('the Bank'). The first land was registered in the name of Leong Wan Yin @ Leong Mun Ying. As to the second land, it is of undivided shares owned by the same Leong Wan Yin @ Leong Mun Ying as to its $^1/_3$ share and as to the remaining $^2/_3$ share, Leong Wan Yin @ Leong Mun Ying held it as a Penjaga Amanah (Trustee) for two minors viz Leong Min Sze and Leong Khing Yun in equal shares. What concerns the application by this originating summons of the plaintiff is in respect of the second land.

In Originating Summons No 7 of 1984, the Bank as the chargee brought a charge action against the owners of the two lands. Upon the hearing of that application by the Bank, on 13 December 1986, Haji Wan Mohamed J made the following order:

I order that $^{2}/_{3}$ undivided share of land held under Grant No 5369 for Lot No 12, Mukim Kerteh, Kemaman (the second land) which is held by the chargor in trust for the two minors shall not be foreclosed, but I allow the application in respect of the rest of the properties charged to the Applicants be sold by public auction.

Unhappy with a part of the said decision, the Bank filed an appeal to the Supreme Court vide Civil Appeal No 58/87. It is to such part only of the said decision which held that the $^{2}/_{3}$ undivided share of land held under Grant No 5369 for Lot No 12, Mukim Kerteh, Kemaman which is held by the chargor in trust for the two minors shall not be foreclosed. There was no appeal from either party to the said proceedings as to the rest of the decision of the learned judge which ordered that the rest of the properties, which includes the $^{1}/_{3}$ share held by the chargee in his own right, be sold by public auction.

The Supreme Court heard the appeal of the Bank and on 15 August 1997 dismissed it. With this decision of the Supreme Court, the decision of Haji Wan Mohamed J made on 13 December 1986 became final.

In the meantime before the hearing of the appeal by the Supreme Court, the order for sale of the learned judge was executed in that the $^{1}/_{3}$ share in the second land owned by Leong Wan Yin @ Leong Mun Ying, the chargee, was put on auction.

Facts leading to the application of the plaintiff

On 17 November 1991 at the auction, the plaintiff in the present proceedings was the successful bidder in respect of the said $^{1}/_{3}$ share in the second land belonging to Leong Wan Yin @ Leong Mun Ying, a subject matter of the order of Haji Wan Mohamed J of 13 December 1986. He paid RM60,000 for it. A certificate of sale by court in Form 16F dated 24 May 1992 was issued to him. When it was presented for registration it was refused on the ground of the existence of a private caveat upon the land entered on 30 May 1992 by one Chung Sun Jong vide Presentation No 72/92 Jilid 1 Folio 33. Upon his application by Originating Summons No 25–12–1995, on 6 December 1995, the said caveat was ordered to be removed. He again presented the Form 16F for registration. It was again refused because this time there was in existence the defendant' s caveat entered on 23 December 1995 vide Presentation No 358/95 Jilid 3 Folio 26. For failure to have the said land transferred to him, the plaintiff now files this application.

The application

This application of the plaintiff is intituled as being in the matter of ss 323, 327 and 417 of the National Land Code and O 15 r 16 of the Rules of the High Court 1980 and in the matter of the said caveat. By this application, the plaintiff asks the court to:

... memutuskan soalan-soalan yang berikut, iaitu:

A (1) satu deklarasi satu Kaveat Persendirian yang dimasukkan oleh defendan melalui Perserahan No: 358/95 Jilid 3 Folio 26 yang bertarikh 23 Disember 1995 ke atas tanah hakmilik Geran 5369 Lot 12 Mukim Kerteh, Daerah Kemaman dibatalkan.

(2) satu deklarasi Pendaftar Hakmilik Terengganu diarahkan untuk membatalkan Kaveat Persendirian tersebut dalam tempoh tujuh hari B daripada tarikh penyerahan Perintah ini ke atasnya.

(3) satu deklarasi supaya gantirugi yang dialami oleh Pihak Pemohon akibat kemasukan kaveat persendirian tersebut ditaksirkan oleh Pendaftar Mahkamah yang mulia ini.

(4) perintah lain yang adil dan saksama.

C (5) kos tindakan ini adalah kos dalam kausa.

This application is supported by an affidavit of the plaintiff filed on 3 August 1998. Following that there were exchanges of affidavits by both the plaintiff and the defendant.

D At the hearing of this application of the plaintiff the defendant raised various preliminary objections over the application. First, it is said that this application is an attempt to validate an invalid order for sale of the learned judge of 13 December 1986. It is the contention of the defendant that the charge by Leong Wan Yin @ Leong Mun Ying to the Bank in respect of the second land was in respect of the whole which comprises of the $^1/_3$ share E owned by him and the remaining $^2/_3$ being held by him as a trustee for the two minors. As that $^2/_3$ share being held unenforceable, the whole charge becomes unenforceable by virtue of s 241 of the NLC which allows only the charging of the whole but not a part only of any undivided share in alienated land. This order of the learned judge was confirmed by the Supreme Court when it dismissed the appeal by the Bank against the said decision. By such F pronouncement by the courts, it is said that there was a cause to the contrary to defeat the application for an order for sale of the land. I think the defendant missed the point here. On the facts the whole of the second land was charged by the chargor to the chargee. The order of the learned judge of 13 December 1986 does not in any way affect the legality of the G charge. All the order said is that that portion comprising the $^2/_3$ share held in trust is not to be foreclosed. The court in the order allowed the foreclosure of the $^1/_3$ share held by the chargor in his own right. By such an order it does not mean that the charge was invalid, as otherwise, there would not be an order at all as to the foreclosure of the $^1/_3$ share. Hence, it is erroneous on the part of the defendant to suggest that the charge which was H the subject matter of the foreclosure proceedings by the Bank was invalid rendering the sale by auction to the plaintiff to be invalid. On this ground, the preliminary objection is overruled.

The next objection of the defendant to this application of the plaintiff centers around the validity of the originating summons of the Bank against I the chargor leading to the auction of the $^1/_3$ share of the second land. They are on three sub-grounds. I will go through them one by one. The first is that that originating summons was null and void for the reason that it had

expired and the renewal granted took effect from the date after the expiry date of the original summons. Without going into the substance of the matter, all I say is that, this court now cannot go behind the valid order made by the learned judge therein. The plaintiff herein was not at all a party to that proceedings. He is involved only following the making of that valid order by being a purchaser for value without notice during the auction of the land arising out of that valid order for sale. The validity or otherwise of the originating summons resulting in the order for sale would not be the concern of this court and the plaintiff herein. The second relates to the allegation of the defendant herein that the substituted service of that originating summons before the learned judge upon the chargor was bad and further that at that time the chargor was a bankrupt. Again without dwelling into the merit of the matter, the same principle applies here in as far as this court is concerned when dealing with this present application of the plaintiff. Thirdly, it is the contention of the defendant that the notice in Form 16E issued by the Bank to the chargor to apply for an order for sale of the whole land was no longer valid for the reason that the order of the learned judge affects only the $^1/_3$ share of the land. For similar reason this line of argument does not impress me at all. In the circumstances, the objection under this head is also overruled.

The last point of objection raised by the defendant over this present application of the plaintiff is of some significance which is that the application praying for declarations is defective in substance and is not curable. Basically the prayers sought by the plaintiff are that this court do declare that the said caveat of the defendant be annulled. Secondly, do declare that the Registrar of Title, Terengganu be ordered to annul the said caveat of the defendant within seven days, and thirdly, do declare that damages suffered by the plaintiff on account of the wrong entry of the said caveat by the defendant be assessed. According to the defendant, what the plaintiff ought to pray for in his application was for an order of court for the removal of the said caveat of the defendant under s 327 of the NLC, and upon such a prayer the court may make such an order for the removal, if the court thinks that it was just to do so. Upon such an order being made and the order being served on the Registrar, it would be incumbent upon the registrar to comply with such order by cancelling the entry thereof on the register document of title. But as it is prayed now, what is required by the plaintiff is for the court to make a declaration that the said caveat be annulled and then to direct the registrar to so annul within seven days. If the application of the plaintiff is to be taken as one made under s 417 of the NLC, being a section included in the intitulement, it is submitted that it would still be defective because the said section would not authorize the court to direct the Registrar to make an entry annulling the caveat which clearly is inconsistent with the scheme of the NLC. Hence, the defectiveness in the said application of the plaintiff. To see the soundness or otherwise of the objection of the defendant, a close study of the two sections in the NLC is necessary. Before I do that, let me digress for a moment on the issue of the significance of an intitulement contained in an application to be placed before the court. In an application to the court an

applicant must be clear of its intent to move the court to grant him the application sought. Gopal Sri Ram JCA said the following in *Cheow Chew Khoon @ Teoh Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 477:

> The summons does not ... state any particular Rule of Court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, one might ask, is a defendant or the court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation.

Though in this case, the plaintiff explicitly specifies the various sections of the NLC and rules of court under which the application is made but it leaves the court and the defendant to have to conduct a close examination of the matter in order to determine the particular jurisdiction or power that is being invoked by this summons of the plaintiff. By the nature of the intitulement the plaintiff would be at liberty to shift from one rule to another or indeed from one section of the law to another as he pleases without any warning whatsoever to the defendant or the court. Indeed it is a mockery of the principle that there must be no surprise in civil litigation.

Section 327 of the NLC states as follows:

> (1) Any body or person aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.
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> (2) The Registrar shall, on being duly served with any order under this section for the removal of the caveat, cancel the entry thereon on the register document of title, and note thereon the reason for the cancellation and the date thereof.
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> (3) Every cancellation under sub-s (2) shall be signed and sealed.

Whilst s 417 thereof states as follows:

> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.
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> (2) Where, pursuant to any order made by virtue of this section, the Registrar or any Land Administrator —
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> (a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or
>
> (b) makes any other amendment of, or addition to, any such instrument,

he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.

(3) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

The provisions under s 327 is clear. It is an application to court by any person or body aggrieved by the existence of a private caveat entered on the register document of title under s 322 of the NLC. The applicant seeks for a court order for the removal of such caveat from the document of title. If the application is granted, the Registrar would be served with the said order of court for the removal of the said caveat. On being duly served with the order, it is the duty of the Registrar to cancel the entry thereof on the register document of title and to note thereon the reason for the cancellation and date thereof. Whereas the purport of s 417 of the NLC is to be found in the operative words 'any judgment or order given or made in any proceedings relating to land' appearing in sub-s (1) thereof. Before the subsection operates, there must have been in existence any judgment or order given or made in any proceedings relating to land, and the court order to be obtained under the subsection is merely to direct the Registrar or any land administrator to do all such things as may be necessary to give effect to such judgment or order already given or made in any previous proceedings which up to the time this application under the subsection is made, had not been given effect as yet.

The former deals with a court order directing someone to undo certain thing which that someone had done. Whilst the latter deals with a court order directing someone to do something necessary to give effect to any previous matter dealt with by the court which had not yet been carried out. Take the case of the entry of a caveat on the register document of title to land. Such entry was not made on account of any judgment or order previously given or made by any court. Therefore, to resort to s 417(1) to get the court to direct the registrar or any land administrator to annul the existing caveat on the land is clearly an abuse of the process of court in that the court has no jurisdiction under the section to do so. Therefore, in order to get an existing caveat removed, a proper application under s 327 of the NLC must be resorted to. It is a specific provision for any person or body who is aggrieved by the existence of a private caveat to apply to court for its removal.

As to the entry of a caveat not made on account of any judgment or order given or made by any court, resort may be had to *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 where at p 214 Lord Diplock (delivering the judgment of the Privy Council) said:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law. By s 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave

> curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By s 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

An applicant can invoke the jurisdiction of the court only when the registrar under s 326 upon the application of a caveatee serves on a caveator a notice of intended removal of the caveat entered pursuant to s 322 by applying to court for extending the statutory period of two months of the life of such caveat after the service of such notice on him by the registrar, and also when an application by a caveator is made to the court under s 327 for its removal.

Now, reverting back to this application of the plaintiff, by the intitulement provided, the plaintiff resorted to the provisions of ss 327 and 417 of the NLC. It is clear, therefore, that his application is not only wrong but plainly embarrassing. The defendant and the court cannot be taken on a wild goose chase to determine the particular jurisdiction or power that is being invoked by his present application. As early as 1988, Siti Norma Yaacob J (as she then was) in *Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861 has this to say to an applicant whose application was worded in such a way that it may well be construed to be an O 18 r 19 application or alternatively an O 14 application:

> At the outset, I need to point out that it is very important that the plaintiff should state categorically under which Order or Rule of the Rules of the High Court that it is proceeding with, so as to give the defendant due notice of the nature of the application to enable it to direct its mind as to the issues that are really in dispute. The plaintiff should elect whether it wished to proceed under O 18 r 19 or under O 14, but it cannot proceed on both.

Then in 1992 in *Asia Life Assurance Society Ltd v Kong Leong Aik* [1992] 4 CLJ 2053, Haidar J (as he then was) echoed with the following at p 2055:

> No doubt it is a matter in the appellant's discretion to proceed either under O 14 r 12 or O 26A of SCR but I do not think the appellant could proceed on both.

In 1955, the Court of Appeal was confronted with a similar situation. In *Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd* [1995] 2 MLJ 851 Zakaria Yatim JCA (as he then was) at p 858 said:

> I entirely agree with Siti Norma Yaacob J and Haidar J that a plaintiff cannot proceed with both prayers for striking out and for summary judgment in one application. The reasons are obvious. Firstly, under O 26A of the SCR the primary emphasis is on the affidavit. No defence need be filed. In an application under O 14 r 21 of the SCR, there must be a statement of defence. Secondly, in an application under O 26A, the court has to decide whether there are triable issues which ought to be tried.

NH Chan JCA in the same case at p 861 has this to say on the matter: A

> Just as a trial judge has no power to dictate to a litigant what evidence he should tender, in all civil proceedings the court has no power to dictate to a litigant what form of application he should make or what kind of order he should apply for. In the same way, just as 'the court cannot give a direction about evidence unless one of the litigants desires such direction to be made' B (per Lord Templeman [1987] 1 MLJ 433 at p 436; (1987) 4 PCC 691 at pp 696-697, [1987] 1 WLR 413 at p 418), the court also cannot give a direction as to which one of the applications (if there are more than one) the litigant, who is applying, should choose to apply for an order on. Of course, a judge may indicate to the applicant that unless he elects as to which application he is applying for an order on, his summons-in-chambers is likely C to fail. Since it is the applicant who is applying to the court for an order, he has to decide for himself which is the one he is asking for an order on, otherwise, the summons-in-chambers will be dismissed because the applicant cannot proceed on both applications together.

As to the matter before me now, though strictly it is not the case of the plaintiff making alternative prayer but it is the case of him making certain D prayers invoking two different jurisdictions of the sections of the law, ie ss 327 and 417 of the NLC. Under the circumstances, I hold that the same principle applies in that he cannot proceed based on the two provisions of the NLC unless he elects either to proceed under s 327 or 417 of the NLC. The question now is whether in the circumstances, the plaintiff may be given the option to elect which of the provisions of the two sections he E proposes to proceed. However, in the light of the preliminary objection raised by the defendant as to the propriety of his application, I am entitled to look at the application in the context of the operation of the two sections of the NLC instead of first calling for the plaintiff to make an election for if I find that the prayers sought do not fit in any of the two sections, then it is F sheer waste of time to disallow this preliminary objection of the defendant and to proceed to hear the merit based on the election made by the plaintiff.

As stated earlier, this application of the plaintiff sought the aid of this court for declarations that the private caveat of the defendant on the second land be annulled and the Registrar of Title Terengganu be ordered to annul G it within seven days from the date of the service of the order made upon the first declaration. Lastly, the plaintiff asks for a declaration that the damages flowed therefrom be assessed. I cannot find from the NLC of the power of court to make such a nature of declaration. What power the court has is as provided for explicitly by s 327 for making an order for the removal of the said caveat of the defendant. But this is not what the plaintiff by this H application wants the court to do. He seeks the court instead firstly, to declare that the caveat be annulled and secondly, to declare that the Registrar be ordered to annul the same within seven days. Under the provisions of s 327 the court is not empowered to annul but is empowered only to make an order for the removal of the said caveat. Only upon such order in clear term be made will the Registrar be entitled to act under I s 327(2) to cancel the entry thereof on the register document of title. Without the order for its removal, the Registrar cannot be ordered to do

such thing. Under the provisions of s 417 the court is also not empowered to do so as the entry of the defendant' s caveat on the second land did not arise out of any judgment or order previously given or made by the court.

Conclusion

Upon the analysis of the whole matter, I find that this application of the plaintiff is indeed misconceived, frivolous and vexatious and a clear abuse of the process of court. Either way the plaintiff makes his election now would not remedy the situation. The learned counsel for the plaintiff urged upon me to invoke the famous saving clause under O 2 r 1(1) of the Rules of the High Court 1980 to regard this defect in the plaintiff's application as an irregularity which will not nullify the proceedings. I see no merit in this. It is not a case of a failure to comply with the requirements of the Rules of the High Court but a failure to comply with the specific provisions of the NLC in presenting the application to the court. As stated earlier, the nature of the plaintiff's application would not fit in any of the two sections cited. Hence, O 2 of the RHC does not at all apply in this case. In the circumstances, I accept the preliminary objection of the defendant on this ground and accordingly, this application of the plaintiff is dismissed with costs it being misconceived, frivolous and vexatious and an abuse of the process of court.

Plaintiff's application dismissed.

Reported by Jafisah Jaafar